No. 15806

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL MAIL LINES, LTD.,

Appellant,

vs.

JOSEPH PECK and ASSOCIATED-BANNING CO.,

Appellees.

APPELLANT'S BRIEF ON REHEARING.

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APPELLANT'S BRIEF ON REHEARING.

INTRODUCTION.

Appellant respectfully refers to its Opening Brief and its Reply Brief and incorporates the same herein. Appellant relies upon the arguments made in said briefs and here seeks only to meet arguments advanced by Associated-Banning's Brief on Rehearing.

I.

The District Court's Judgment on the Indemnity Question Should Be Reversed and Judgment Ordered for Appellant.

A. The Undisputed Facts.

The following facts are incontrovertibly established:

1. When Associated-Banning took over PARIMA, the boom in question was secure and safe. Regardless of how many turns of the line there were around

the bitts, the overlying figure 8's were sufficient to hold the boom in place. The boom had been rigged by means of a chain stopper by the ship's crew on the morning preceding the accident. [R. 177-183, 188, 199.]

2. Before stevedore foreman Wicks started to lower the boom, it could have been lowered either by means of a chain stopper or by surging. [R. 50, 58, 59, 119-120, 176.]

3. Of these two methods, use of a chain stopper was by far the safer. [R. 97-98, 177.] Both methods required about the same amount of time and effort. [R. 58-59, 120, 177.]

4. A chain stopper was available either at the bitts or for the asking. [R. 179, 180, 184.]

5. Whichever of these methods is used to lower and rig a boom, more than one man is required for the job. [R. 48, 49, 120.]

6. It would have been possible for a sufficient number of men to surge the line. (Associated-Banning disputes this fact on page 2 of its Brief on Rehearing, stating that "There was but room for one man, Wicks, at the place down in the deck load where the figure eights were removed." This statement is not supported by the evidence; the only testimony on the question is inconclusive. [R. 57, 58.] Even if only one man could actually work at the bitts, it is not true that there was no room for two or three additional men to assist in the surging by holding the line on the slack side of the bitts. Examination of the photographs in evidence clearly demonstrates this. Ineed, two of plaintiff's witnesses who

at the time were employed by Associated-Banning testified that just before the accident they were on their way to help Wicks by holding onto the line. [Testimony of Brookshire, R. 90; testimony of Enyeart, R. 111.]) It is undisputed that two members of the ship's crew were able to raise the boom that very morning. [R. 174-177.]

7. When lowering the boom by the surging method it is necessary to remove each turn of wire carefully, including the figure 8 turns, testing to see if the weight of the boom can be supported and it is often necessary to use figure 8 turns in addition to round turns to support the boom. [R. 48, 67-69, 73-74.]

8. After making the round turns Boatswain Donovan and Seaman Rowbottom "made a number of figure 8's to the top of the bollards" [R. 199]—at least four figure 8 turns. [R. 176, 188.] Thus there was always a sufficient number of turns and figure 8's to support the boom.

B. The One Disputed Fact.

The single factual dispute was whether there were two or three or more turns on the bitts beneath the figure 8's. As shown below, even if there had only been two turns, that fact would be immaterial, because it would not establish a breach of duty on the part of Appellant or negative negligence on the part of Associated-Banning, and judgment should be in favor of Appellant.

A finding that there were only two turns would be against the weight of the evidence. Only the deposition witness, Enyeart, an employee of Associated-Banning, testified that there were two turns. He was in no position to see, his eyes being about 13 feet *above* the bitts.

Examination of the photographs of the area and of the bitts demonstrates that Enyeart actually could not have been able to tell for sure whether there were one, two, three, four, five or six turns, from where he stood.

Testimony of the boatswain Donovan, the man who actually saw and supervised the securing of the line to the bitts, and of Rowbottom, the seaman who actually wound the line around the bitts, is squarely opposed to that of Enyeart and should be given great weight.

Neither Peck nor Associated-Banning called Wicks to testify for them, yet his testimony concerning the number of turns would have been most interesting. Since he was an employee of Associated-Banning it is to be presumed that Wicks would not have testified that there were only two turns. (Cal. Code Civ. Proc., Sec. 1963(5)(6).) Wicks must have been able to see how many turns there were. Had there been but two, he surely should not have attempted to surge the line by himself.

Whether there were two or more round turns is actually immaterial and has no causal relation to the accident because Wicks should have tested each turn as he removed them and used all or part of the available figure eight turns as was necessary in addition to the existing round turns to surge the boom. The only witness who saw what Wicks did testified that he removed all the figure eights in less than thirty seconds! [Testimony of Enyeart, R. 137.]

II.

The Facts Conclusively Show That Associated-Banning Breached Its Duty Under the Stevedoring Agreement.

It is uncontroverted that Associated-Banning attempted to rig the boom in a dangerous manner (*i.e.,* by surging) when a safe method (*i.e.,* using the chain stopper) was possible. This alone constitutes a breach of duty under the rule of the *Ryan* and *Weyerhaeuser* cases.

It is also uncontroverted that Associated-Banning was attempting to surge the line in an extremely negligent fashion, *i.e.,* by using one man instead of three or four to do the job and by not carefully testing each turn as it was removed from the bitts. This was negligence of the grossest, most foolhardy sort and clearly constituted breach of duty.

Peck's injury quite clearly was the foreseeable result of these breaches of duty. Thus, absent conduct on the part of Appellant nullifying Associated-Banning's obligation to indemnify it, Appellant is entitled to indemnity.

> *Weyerhaeuser Steamship Co. v. Nacirema Operation Co., Inc.,* 355 U. S. 563, 2 L. Ed. 2d 491 (1958).

III.

Appellant Is Not Precluded From Recovering Indemnity by Its Conduct.

A. Appellant Breached No Duty Owed by It to Associated-Banning.

I.

To determine whether a shipowner has breached its duty to a stevedore, that duty must first be defined.

At the time this case was originally briefed and argued, there was very little authority defining the duty owed a contracting stevedoring company by a shipowner. In its Reply Brief, Appellant argued that the shipowner's duty is "to turn over its ship to the stevedoring company in a reasonably safe and fit condition for the service to be rendered." (Appellant's Rep. Br. p. 8.) Associated-Banning on the other hand has argued, and now bases its case upon the argument, that the shipowner's duty *vis-a-vis* stevedore is the *same* as its duty *vis-a-vis* the longshoreman.

The shipowner's duty has recently been defined by the learned and complete opinion of the Honorable William Mathes in *Hugev v. Dampskisaktieselskabet International,* ...... Fed. Supp. ......, 1959 A. M. C. ...... (S. D. Cal., No. 20340-WM; decision filed Jan. 21, 1959). This opinion has not as yet been published so we quote from it here at length:

> "Defendant shipowner admits owing an implied warranty of seaworthiness to plaintiff longshoreman, and a breach of that warranty 'due to insecure hatch boards at No. 1 hatch'; also that such breach was one of the proximate causes of plaintiff's injuries. But the shipowner asserts that this unseaworthy con-

dition did not constitute a breach of any obligation owed by the shipowner to the stevedoring contractor.

"The implied warranty of the shipowner as to seaworthiness, first raised by law in favor of the shipper of cargo [*The Caledonia,* 157 U. S. 124, 130 (1895)], later extended to seamen [*The Osceola,* 189 U. S. 158 (1903)], and still later to longshoremen [*Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 89-94 (1946)], does not extend to the stevedoring contractor. Those considerations of reason and policy which prompted extension of the benefit of the warranty to the individual longshoreman, absent any contractual relationship, do not exist with respect to his employer, the contracting stevedore. [Cf. *Kermarec v. Compagnie Generale Transatlantique,* 245 F. 2d 175 (2d Cir. 1957), *cert. granted,* 355 U. S. 902 (1957); 27 U. S. L. Week 3166 (U. S. Dec. 2, 1958) (No. 22).]

"The stevedoring contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be. Moreover, since predicated upon principles of tort liability rather than contract, the obligations imposed by law upon the shipowner in favor of an individual longshoreman coming aboard ship to work in loading or unloading the cargo are quite different from the obligations of the shipowner in favor of the longshoreman's employer arising from the stevedoring contract. It is necessary, then, to look to the stevedoring contract to learn what obligations are there imposed upon the shipowner—not by law, but by contract—in favor of the stevedore employer.

"Where, as here, the terms of the stevedoring contract do not expressly impose upon the shipowner any material obligation beyond that of payment to

cover the stevedoring service, all additional contractual obligations on the part of the shipowner must, as with the stevedores in *Ryan* and *Nacirema,* be implied in fact from the inferences necessarily arising out of the circumstances surrounding the contract and its performance. [Cf. Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. L. Rev. 321, 342-346 (1954).]

"The stevedoring agreement is a maritime contract [*Atlantic Transport Co. v. Imbrovek,* 234 U. S. 52, 61-62 (1914)], so any obligations to be implied as in fact arising from the contract should take cognizance of the maritime considerations involved. Ships, as well as seamen and longshoremen, are subject to the 'hazards of maritime service.' Ships still break up at sea. Even though the ships of today may not be as vulnerable, the typhoons of our day are as 'formidable and swift' as when Conrad wrote. The Pacific Coast is as treacherous now as it was some two generations ago when the Nottingham was battered into a hulk off the Oregon coast. [*The Nottingham,* 236 Fed. 618 (9th Cir. 1916).]

"In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other ports throughout the world.

"Being a mass of plates, pipes, wires, beams and various mechanisms, each to some degree vulnerable to the elements, it would be much too much to expect a cargo vessel to arrive in port with all equipment, appliances and facilities in a fully seaworthy condition. Especially is this true with respect to the hatches, booms and winches, which are relatively more likely to be in disorder because of the elements, and the abuse and misuse of men as well. It is reasonable to expect, then, that many things may be wrong with a freighter and her equipment and appliances when she arrives in port; that she may well be a place of danger even as she docks. And all of these lurking dangers may be due entirely to the hazards of the ship's service.

"The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time.

"Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and applicances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition. Hence it is not reasonable to infer that the shipowner, in executing the

stevedoring contract, impliedly covenants that the condition of the ship or of her equipment or appliances will exceed the stevedoring contractor's reasonable expectations.

"This is not to suggest that the surrounding circumstances are such as to require the contract to be so construed that the stevedoring contractor boards the vessel wholly at peril. To the contrary, with the shipowner, as with the stevedore, certain obligations are to be implied in fact as being of the essence of the stevedoring contract. [*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra,* 350 U. S. at 133.]

"Although admonished in *Ryan* that resort may not be had to principles of quasi-contract or to the law of torts to ascertain the obligations of the shipowner *vis-a-vis* the stevedoring contractor, it is helpful in considering the surrounding circumstances of fact and law, in the light of which the stevedoring contract was made, to recall the long-settled rule that the shipowner owes a duty of ordinary care imposed by law toward 'persons rightfully transacting business on ships . . .' [*Pope & Talbot, Inc. v. Hawn, supra,* 346 U. S. at 413, n. 6; and see e.g., *The Max Morris,* 137 U. S. 13 (1890); *Leathers v. Blessing,* 105 U. S. 626 (1882); *Tidewater Associated Oil Co. v. Richardson,* 169 F. 2d 802 (9th Cir. 1948).]

"The surrounding circumstances of fact, and that of law just recited, prompt the holding that, absent express provision to the contrary, the shipowner owes to the stevedoring contractor under the stevedoring contract the implied-in-fact obligations: *(1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced steve-*

doring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedore in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedore to encounter in the performance of the stevedoring contract. [Cf. *Parenzan v. Iino K.K.K.*, 251 F. 2d 928 (2d Cir. 1958), *cert. denied*, 356 U. S. 939 (1958); *Amerocean S.S. Co. v. Copp*, 245 F. 2d 291 (9th Cir. 1957); *United States v. Harrison*, 245 F. 2d 911 (9th Cir. 1957); *Southport Transit Company v. Avondale Marine Ways*, 234 F. 2d 947, 951 (5th Cir. 1956); *American President Lines v. Marine Terminals Corp.*, 234 F. 2d 753 (9th Cir. 1956), *cert. denied*, 352 U. S. 926 (1956); *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (2d Cir. 1954); *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (3d Cir. 1953); *Slattery v. Marra Bros.*, 186 F. 2d 134, 139 (2d Cir. 1951); *United States v. Rothschild Int. Stevedoring Co.*, 183 F. 2d 181 (9th Cir. 1950); *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (2d Cir. 1950); *United States v. Arrow Stevedoring Co.*, supra, 175 F. 2d at 331; *Calanchini v. Bliss*, 88 F. 2d 82 (9th

Cir. 1937); *Cornec v. Baltimore & Ohio R.R. Co.,* 48 F. 2d 497, 502 (4th Cir. 1931), *cert. denied,* 284 U. S. 621 (1931); *Seaboard Stevedoring Co. v. Sagadahoc S.S. Corp.,* 32 F. 2d 886 (9th Cir. 1929); *Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.,* 10 F. 2d 769, 771 (9th Cir. 1926); 2 Restatement, Torts, §§360, 332, comment h (1934); 2 Harper & James, The Law of Torts, §27.17 (1956).]

"The evidence is not such as to warrant a finding that the shipowner here breached either of these implied-in-fact obligations of the stevedoring contract in any respect. On the contrary, the evidence establishes full performance by the shipowner. [Cf. *American Mut. Liability Ins. Co. v. Matthews,* supra, 182 F. 2d at 324.]

"Of course, as third-party defendant points out, there is a third implied-in-fact obligation on the part of the shipowner not unreasonably or materially to hinder, delay or interfere with performance of the stevedoring operations. [Restatement, Contracts, §§295, 315 (1932); 4 Corbin, Contracts, §947 (1951)]. However, there is no evidence of any unreasonable or material prevention of performance on the part of the shipowner in the case at bar. The contract expressly provides that the stevedoring contractor is to be paid on a time basis for service of every kind, including the repair of defects in hatches or other ship appliances and equipment, and that the contractor is to be paid also for standby time due to any delay in the stevedoring operations caused by the shipowner.

"Accordingly, the finding must be that the shipowner at bar did not breach, but fully performed, both its express and implied-in-fact obligations to the stevedoring contractor under the contract."

Another recent case in point is *Vladmir v. Johnson Line,* 1959 A. M. C. ...... (S. D. Cal., No. 1044-57 T; decision filed Nov. 5, 1958), where the Horonable Ernest Tolin held that shipowner's duty to stevedore is only to "furnish a vessel reasonably capable of being unloaded by a careful, expert stevedore."

B. The Claimed Breach of Duty by Appellant.

On page 8 of its Brief on Rehearing, Associated-Banning argues that, since a claim for indemnification sounds in contract, Appellant was required to demonstrate that it did not breach *any* duty owed Associated-Banning. This stretches the contractual theory too far. It is well to remember that although the duties and liabilities as between shipowner and stevedore arise out of contract, tort principles of proximate cause, intervening cause, etc., must in the last analysis be looked to in placing liability.

> *Reddick v. McAllister Lighterage Line, Inc.,* 258 F. 2d 297 (2d Cir., 1958), cert. denied, 27 U. S. L. Week 3176 (U. S. Dec. 9, 1958);
>
> *Revel v. American Export Lines,* 162 F. 2d 279 (E. D. Va., 1958).

Thus, Associated-Banning could not defend herein on the basis of a breach of duty by Appellant unrelated to the accident and occurring at the bow of PARIMA or at Hatch No. 5. (Peck was injured at Hatch No. 3.) Consequently, Appellant should not be required to show performance of all its duties unrelated to the accident in question.

There is no issue herein as to who, Appellant or Associated-Banning, had the burden of proof on the question whether Appellant duly performed its relevant duties. It would appear, however, that the burden should be upon the stevedore, as in the case of contributory negligence.

At the very least, the stevedore should be required to go forward on the issue to the extent of stating which duties it claims were relevant to the injury and were breached. Associated-Banning has done this, claiming that Appellant breached its duty by turning over PARIMA with two rather than three or four turns on the bitts.

C. Appellant Breached No Duty.

Its duty to Associated-Banning as shipowner having been defined and a specific breach of duty having been claimed, it is clear that Appellant is not precluded from recovering indemnification. If there had only been two turns:

1. It is inconceivable that Wicks would not have seen this. (See photographic exhibits; if Enyeart standing where he was could see it, how could Wicks have missed seeing it?)
2. A careful, expert stevedore must be presumed to have had knowledge of it. (See photographic exhibits.)
3. A careful, expert stevedore would have lowered the boom by means of a chain stopper, thus making it unnecessary to rely at all on the turns and figure eights on the bitts.
4. A careful, expert stevedore could have safely lowered the boom by surging if a sufficient number of men had been employed to do the job.
5. A careful, expert stevedore would have tested each turn as removed and would have used the available figure 8's in addition to round turns, if necessary.

The facts being such, no duty was breached by Appellant and it is entitled to indemnity. *Hugev v. Dampskisakticselakabet International, supra.*

D. Authorities Cited by Appellee Associated-Banning.

Associated-Banning cites two cases as indicating that shipowner's duty to stevedoring contractor is the same as its duty to longshoreman. Neither case is authority for that proposition.

(a) *Olesszcuk v. Calmar*, 164 Fed. Supp. 628 (D. Md., 1958), is not in point. There the shipowner by *express written agreement* took on duties additional to those which are implied in fact where the contract is silent as here and in the *Ryan* and *Weyerhaeuser* cases. In that respect the case is similar to *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (3d Cir., 1956).

(b) *Smith v. Pan-Atlantic Steamship Corp.*, 161 Fed. Supp. 422 (E. D. Pa., 1957), requires careful reading. The District Court decided the case on August 6, 1957. The *Weyerhaeuser* case was decided March 3, 1958, but was not reported in the advance sheets until several weks later. The appeal in *Smith v. Pan-Atlantic* was argued April 14, 1958, and decided April 30, 1958, the Court writing only a short *per curiam* opinion (254 F. 2d 600). Thus, the case might be considered as either a pre-*Weyerhaeuser* or a post-*Weyerhaeuser* case.

Whether the decision in *Smith v. Pan-Atlantic* be considered a pre-*Weyerhaeuser* or a post-*Weyerhaeuser* decision, it is wrong!

Considering it as a pre-*Weyerhaeuser* decision, the District Court's rhetorical question, at page 423:

> "Is it part of a stevedoring contract that the stevedore will walk off the job if it finds the ship's equipment unsuitable?"

must be answered in the affirmative rather than, as Judge Kirkpatrick supposed, in the negative.

> *Parenzan v. Iino Kaiun Kabushiki Kaisya,* 251 F. 2d 928 (2d Cir., 1958), *cert. denied,* 356 U. S. 939, 2 L. Ed. 2d 814;
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> *United States v. Harrison,* 245 F. 2d 911 (9th Cir., 1957);
>
> *American President Lines v. Marine Terminals Corp.,* 234 F. 2d 753 (9th Cir., 1956), *cert. denied,* 352 U. S. 926, 1 L. Ed. 2d 167;
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> *Berti v. Compagnie de Navigation, etc.,* 213 F. 2d 397 (2d Cir., 1954);
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> *United States v. Rothschild Int. Stevedoring Co.,* 183 F. 2d 181 (9th Cir., 1950);
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> *United States v. Arrow Stevedoring Co.,* 175 F. 2d 329 (9th Cir., 1949), *cert. denied,* 338 U. S. 904, 94 L. Ed. 557;
>
> *Hugev v. Dampskisaktieselskabet International,* ...... Fed. Supp. ......, 1959 A. M. C. ...... (S. D. Cal., No. 20340-WM, decision filed Jan. 21, 1959).

This is especially true in the present case where the stevedore contract provides, in paragraph 8, for compensation for "Detentions, waiting and standby time" occasioned by such action. [R. 214.]

Judge Kirkpatrick states that it might be negligence toward the longshoreman for the stevedore not to walk off the job, but that such negligence is not a breach of the stevedoring contract but is "in furtherance" thereof. This view is squarely opposed to the *Ryan* case where the Supreme Court stated:

> "Competency and safety of stowage are inescapable elements of the service undertaken." (350 U. S. 133, 100 L. Ed. 142.)

Judge Kirkpatrick further states:

> "The only ground for this third-party action is the contractual obligation assumed by the stevedore to do the work in a proper, safe and workmanlike manner." (161 Fed. Supp. 423.)

But three paragraphs later he states:

> "In the present case, the alleged default of the stevedore was not in breaching its contract but in carrying it out under conditions created by the shipowner." (161 Fed. Supp. 423.)

The Judge concedes that the stevedore knew of the defective device and yet goes on to hold that a contract to do something safely can be performed by knowingly doing the thing unsafely! We see no logic or reason, justice or equity, in this remarkable theory and know of no authority therefor.

Considering the case as a post-*Weyerhaeuser* decision, it is equally fallacious. Viewed in this light, the case merely involves a problem of causation, the question being whose breach of duty actually caused the injury. Judge Kirkpatrick finds for the stevedore because its

> "negligence . . . does not supersede Pan-Atlantic's *violation of its duty to furnish Ryan with seaworthy equipment*." (Emphasis added.)

As authority for the unique proposition that the shipowner *had* a duty to breach and that duty was to provide *seaworthy* winches, the Court relies solely on *Hagans v. Farrell Lines,* 237 F. 2d 477 (3d Cir., 1956).

Hagans v. Farrell Lines is no authority whatsoever for such a proposition because that case involved a stevedore contract which was not silent as to duty, but *expressly required the shipowner to provide such winches.* In af-

firming *Smith,* the Third Circuit also relied solely on the decision in *Hagans v. Farrell Lines,* stating, incorrectly, that there was no essential difference between the cases. Moreover, it has recently been noted that "The indemnity feature of *Hagans* appears to have been discarded." *Revel v. American Export Lines, supra,* at p. 282.

CONCLUSION.

It is respectfully submitted that nothing has been presented by Associated-Banning in either its Petition for Rehearing or its Brief on Rehearing which alters the conclusions presented in Appellant's Opening Brief, Reply Brief and the present Brief. Judgment in favor of Associated-Banning on the third party complaint should be reversed and the cause remanded to the court below with directions to enter judgment against Associated-Banning for Appellant's damages herein, including its costs in all courts. The uncontroverted facts and recent holdings compel such a decision.

Respectfully submitted,

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